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CITATIONS

602330—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 268

THE 18TH STREET LEADER STORES, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals (R. 51–55) is reported in 142 F. 2d 113.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 3, 1944 (R. 56). The petition for a writ of certiorari was filed on July 18, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a claim for refund has been rejected by the Commissioner of Internal Revenue, can the

taxpayer, by thereafter filing a new claim for the same amount and upon the identical grounds asserted in the first claim, thereby enlarge its time for filing suit under Section 904 of the Revenue Act of 1936 beyond the expiration of two years from notice of disallowance of the first claim?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

On or about September 30, 1933, the taxpayer paid cotton floor stocks taxes in the amount of $2,218.32 which had been erroneously assessed under the unconstitutional Agricultural Adjustment Act (R. 2–3). On December 9, 1936, the taxpayer filed a timely claim for refund for these taxes on P. T. Treasury Department Form 76 (R. 4, 7–13). Schedule D of the claim form, where the claimant was required to list evidence submitted with the claim, contained only the following statement (R. 11):

> The burden of the Floor tax was borne by the claimant and not shifted to others in the amount, as set forth on the previous schedules, of $2,218.32.
>
> The following evidence is submitted:
>
> For the fiscal year ended January 31, 1934 gross profits on sales were 30.42%; whereas, for the fiscal year ended January 31, 1935 the gross profits were 30.33%.

> **Further, it is our contention that we did not increase the selling price of the merchandise on those items wherein the floor stocks tax was paid.**

On September 1, 1937, the Deputy Commissioner of Internal Revenue wrote the taxpayer that the statements set out in Schedule D were insufficient to substantiate the contention that the burden of tax had been borne by the taxpayer and not shifted to others, and that evidence in support of the claim would have to be submitted under oath, including a list of articles appearing in Inventories, Records and Returns, P. T. Form 42, showing opposite each item in three separate columns, (1) the prices at which the articles were held for sale on August 1, 1933, (2) the prices at which similar articles were sold prior to that date, and (3) the prices at which the inventoried articles were actually sold. The taxpayer was also required to submit an explanation of the circumstances attending any change in the prices of the inventoried articles and showing the quantities of each article sold prior to each such change. (R. 15–17.) The Deputy Commissioner further wrote the taxpayer on November 3, 1937 (R. 17–18), November 23, 1937 (R. 18–19), December 30, 1937 (R. 20), and February 28, 1938 (R. 21–22), calling attention to the failure to submit evidence in support of the claim and in each case granting extensions of time for the submission of evidence requested.

On May 17, 1938, the Commissioner wrote the taxpayer that since no additional evidence had been submitted, as required by Sections 902 and 903, Title VII, Revenue Act of 1936, and the provisions of Regulations 96, which was sufficient to establish that the taxpayer had borne the burden of the tax, the Commissioner was without authority to consider the claim favorably and that it was therefore rejected in full (R. 23–24).

Thereafter, on December 28, 1939, the taxpayer filed a new claim for refund for the same taxes on the same P. T. Form 76 setting out the same grounds relied upon in the first claim (R. 25–35). Schedule D merely referred to attached affidavits (R. 29). The attached affidavit of Edward Oplatka stated, generally, that the taxpayer had borne the tax burden and that it had not been shifted to others; that books were maintained reflecting true operations of the business but the taxpayer did not keep voluminous records and that other businesses keeping no more detailed records had been successful in securing refunds of processing taxes under the Revenue Act of 1936 (R. 32). The attached affidavits of three employees each stated that affiant knew of his own knowledge "in connection with the payment under Section 602 of the Revenue Act of 1936" that the sales prices to the customers of taxpayer of merchandise of cotton content were not increased subsequent to August 1, 1933, and "that therefore to the best of his knowledge and belief, processing tax was borne

by The Leader Store, in its entirety and was not shifted or passed on to the vendee" (R. 33–35).

On June 21, 1940, the Commissioner addressed a letter to the taxpayer rejecting the second claim for refund. The letter referred to the rejection of the first claim and stated that Regulation 96, Article 302, provided that only one claim for refund shall be filed by any person for the refund of floor stocks taxes. Since the second claim was a duplication of the prior claim it was therefore rejected in full. The letter further stated that the statute of limitations for bringing suit on claims of this character, as prescribed by Section 904, Revenue Act of 1936, of two years from date of mailing notice of disallowance to claimant had expired, and that any refund was barred. (R. 35–36.)

The complaint to recover the taxes was filed on June 20, 1942 (R. 2). The District Court sustained a motion to dismiss the complaint (R. 37–38). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of the District Court was affirmed (R. 56).

ARGUMENT

The case was correctly decided by the court below, and there is no conflict of decisions.

Section 903, Revenue Act of 1936 (Appendix, *infra,* p. 11), authorizes the Commissioner, with the approval of the Secretary of the Treasury, to prescribe by regulations the number of claims which may be filed by any person for taxes collected under the Agricultural Adjustment Act.

Treasury Regulations 96, Article 302 (Appendix, *infra,* p. 14), which deals with claims for refund under the Agricultural Adjustment Act, specifically provides that only one claim shall be filed by any person for refund of floor stocks taxes.

In cases involving other kinds of federal taxes, even in the absence of specific regulations dealing with this question, it is established that after a claim for refund has been rejected, the statutory period for bringing suit to recover the taxes cannot be enlarged by filing a new claim for refund on identical grounds. In such case, the time for instituting the suit runs from the date of rejection of the first claim. *Einson-Freeman Co.* v. *Corwin,* 112 F. 2d 683 (C. C. A. 2d), certiorari denied, 311 U. S. 693; *B. Altman & Co.* v. *United States,* 40 F. 2d 781 (C. Cls.), certiorari denied, 282 U. S. 863; *Ragan-Malone Co.* v. *United States,* 38 F. Supp. 290 (C. Cls.).

The cases relied upon by taxpayer are not in conflict. In *Pacific Mills* v. *Nichols,* 72 F. 2d 103 (C. C. A. 1st), one of the grounds in the claim for refund was that the cost of goods sold was greater than the amount stated in the return, and that the market price of cotton and wool fixed by the Bureau of Internal Revenue was greater than the actual market price. That claim was rejected and a second claim was filed, based on the contention that the taxpayer's closing inventory for wool for the year 1918 should be valued at British Isle prices rather than at prices fixed by the Bureau of

Internal Revenue. The court took the view that the second claim raised different grounds and so was not a repetition of the first claim.[1] But even if it be assumed, as the taxpayer contends, that the claims involved in the *Pacific Mills* case were identical, that decision is not in conflict with the ruling here because the real basis of that decision was that the Commissioner, by considering the second claim, reopened the claim first filed and the statute began to run on the date of final rejection. *Pacific Mills* v. *Nichols, supra* (p. 107). The consideration and rejection of the second claim in this case should not effect a reopening of the original claim, since Section 904, Revenue Act of 1936, here applicable, specifically provides:

> Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

Similarly, in *First Nat. Pictures* v. *United States,* 32 F. Supp. 138 (C. Cls.), and *Sun-Herald Corp.* v. *Duggan,* 15 F. Supp. 415 (S. D. N. Y.), the second claims were based on wholly different grounds from the first claims. In *Detroit Trust Co.* v. *United States,* 18 F. Supp. 776 (C. Cls.),

[1] The taxpayer relied on the *Pacific Mills* case in the *Einson-Freeman Co.* case, *supra.* The court distinguished the case on the grounds above mentioned. See respondent's brief in opposition, *Einson-Freeman Co.* v. *Corwin,* No. 432, October Term, 1940.

the second claim was filed by residuary legatees, whereas the first claim was filed by an administrator.

In *Williams* v. *United States*, 48 F. Supp. 647 (C. Cls.), the Government objected to the timeliness of the first claim because schedules in support of the claim had been filed after the statutory period expired. A second claim covering the identical subject matter was filed as a precautionary step after Congress by Section 405, Revenue Act of 1939, had extended the time for filing claims. Separate suits were filed on both claims and the cases consolidated for trial. The court held that the additional facts supporting the first claim were filed within the time as specified by the Commissioner in a letter written to taxpayer and were properly presented within the Treasury Regulations dealing with the subject.

In *Dinon* v. *United States* (E. D. Pa.), decided February 5, 1937 (1937 C. C. H., par. 9149), and *Stephenson* v. *Woodworth* (E. D. Mich.), decided February 14, 1939 (1939 C. C. H., par. 9469), the Commissioner reopened claims for refund after their disallowance. The cases do not involve the filing of second claims.

L. O. 1116, III–1 Cum. Bull. 350 (1924), relied upon in the petition for certiorari (p. 4), deals only with the reopening of claims on new grounds and the filing of new claims within the statutory period, and hence is inapplicable here.

The court below held that inasmuch as the second claim was rejected because it was a duplicate of the first claim, the question presented by

the appeal was whether the suit was timely filed rather than the adequacy of the claims. The court stated, however, that it was clear under several cases cited that both claims filed by taxpayer were insufficient basis for the allowance of refunds. Even assuming that the court's decision is based upon a holding that both claims were inadequate, its ruling is not in conflict with any of the decisions cited by taxpayer in the petition for certiorari (pp. 4–6). None of these decisions holds that a claimant for a refund of floor stocks taxes is not required to submit any evidence to the Commissioner in support of its claim. A more extensive discussion of this point is contained in the brief for the United States in opposition in No. 247, *New York Handkerchief Mfg. Co.* v. *United States.*

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1944.